

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ROBERT TAVANO</b>	:	<b>ORDER</b>
	:	DTA NO. 818761
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law for the Years 1993,	:	
1994, 1995 and 1996.	:	

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Petitioner, Robert Tavano, FCI Allenwood, P.O. Box 1000, Montgomery, Pennsylvania 17752, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1993, 1994, 1995 and 1996.

The Division of Taxation, by Barbara G. Billet, Esq., (Kevin R. Law, Esq., of counsel) brought a motion dated February 1, 2002 seeking an Order dismissing the petition pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(1)(vi) on the basis that the petition fails to state a cause for relief. On March 6, 2002, petitioner, by his duly appointed representative Ricotta & Personius, LLP (Rodney O. Personius, Esq. and Brian M. Melber, Esq.), filed an affirmation in opposition to the Division's motion. This March 6, 2002 date commenced the 90-day period for issuance of this Order. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following Order.

**FINDINGS OF FACT**

1. Following an audit, the Division of Taxation ("Division") issued to petitioner, Robert Tavano, a Notice of Deficiency dated March 24, 2000, asserting additional personal income tax

due for the years 1993, 1994, 1995 and 1996 in the aggregate amount of \$44,365.40, plus penalty and interest.

2. Petitioner challenged the Division's Notice by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") which, in relevant part, provided as follows:

Representative is, due to the incarceration of taxpayer Robert J. Tavano at LSCI Allenwood Federal Correctional Facility, not in a position to outline facts relevant to the attached Notice of Deficiency. It is respectfully requested this matter be held in abeyance pending Mr. Tavano's release from federal custody. Mr. Tavano wishes to reserve all rights to contest the basis for the findings set forth in the attached Notice of Deficiency.

3. A conciliation conference was scheduled for October 18, 2000, but was subsequently adjourned and rescheduled for April 24, 2001. The April 24, 2001 conference was adjourned and was again rescheduled, this time for May 18, 2001. The conference was held as scheduled on May 18, 2001. By a subsequent letter dated May 24, 2001, the conciliation conferee advised petitioner's representative, in relevant part, as follows:

As I explained to you at the conference, I cannot hold this matter in continued abeyance.

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With respect to the Department's determination, the taxpayer's inability to produce adequate and complete records to support its [sic] filing necessitated the use of an indirect audit method to estimate the taxpayer's income for the years in question. The primary method used in this case was an analysis of bank deposits whereby all deposits were deemed to be taxable sources of income. In addition to the State audit, the Notice of Deficiency also assesses a deficiency relating to a 1993 Federal change.

Inasmuch as you have failed to prove error in the Department's determination, I cannot recommend any reductions to the tax deficiency other than a minor one for 1996 resulting in a change in filing status from married filing jointly to married filing separately.

4. On July 6, 2001, a Conciliation Order (CMS No.181460) was issued reflecting a slight reduction to the amount of tax asserted as due (from \$44,365.40 to \$44,127.27), but otherwise sustaining the Notice of Deficiency including penalty and interest.<sup>1</sup>

5. Petitioner continued his challenge by filing a petition with the Division of Tax Appeals. The petition again noted that petitioner is a Federal inmate incarcerated at FCI Allenwood, and also stated the following:

The records of taxpayer and his businesses necessary to respond to the Notice of Deficiency are currently unavailable, those records being in the possession of the Royal Canadian Mounted Police, Toronto West Detachment, Milton, Ontario L9T 5EB.

The petition references the conciliation conferee's May 24, 2001 letter and its statements concerning the absence of records which necessitated resort to an indirect audit method to calculate petitioner's income for the years in issue. The petition concludes as follows:

It is Petitioner's position that the conciliation conference and, more importantly, any adverse final ruling on the part of the Department of Taxation and Finance should have been and must be held in abeyance until Mr. Tavano's release from incarceration and the return by the Royal Canadian Mounted Police to Petitioner of his records covering the period 1992 through 1996 inclusive. To go forward during the interim violates fundamental rules of fairness, including Mr. Tavano's due process rights. As interest will continue to accrue on any eventual deficiency assessed at the conclusion of a procedure wherein Petitioner is fully and meaningfully able to set forth his position, there is no harm to the Department in granting the requested relief.

6. Attached to the petition and included in the motion papers is a May 16, 2001 letter from Inspector R. W. Davis, Royal Canadian Mounted Police ("RCMP"), confirming that:

the RCMP (Project Oiler) has in it's [sic] possession approximately 20 banker boxes of records relating to Mr. Robert Tavano and his business

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<sup>1</sup> Presumably, the slight reduction in tax amount results from the noted change of filing status from married filing jointly to married filing separately for 1996.

activities as they relate to the purchase and sale of tobacco products. Generally speaking, the records cover a period of 1992 through to 1996 inclusive.

7. The Division's December 6, 2001 answer to the petition affirmatively alleges that the petitioner has failed to state a cause for relief in his petition, requests that the petition be denied and that the statutory Notice of Deficiency be sustained. The subject motion follows this answer in seeking dismissal for failure to state a cause for relief.

8. Petitioner's affirmation in opposition posits that the petition has merit and that the tax determination which petitioner challenges resulted from a denial of petitioner's due process rights to a fair and just hearing, including the opportunity to prepare a defense and present evidence. Petitioner's position is that his incarceration at Allenwood and the unavailability of his records because they were, and continue to be, in the possession of the RCMP, denied him the full and fair opportunity to present evidence to the conciliation conferee and will deny him the opportunity to do so at a hearing. Petitioner argues that without the opportunity to have access to his personal and business records, he is unable to fully participate in or present evidence concerning the deficiency, and that his ability to present evidence is further compromised by his incarceration which prevents his personal participation.

### ***CONCLUSIONS OF LAW***

A. The Division's motion for dismissal is premised on the claim that the petition fails to state a cause for which relief may be granted. The filing of a request for a conciliation conference or of a petition clearly constitutes a challenge to some action undertaken by the Division, such as the assertion of a tax liability (as here), or the denial of a refund claim, or the denial or revocation of a license or permit administered by the Division. In fact, the petition in this case is fully completed and clearly identifies, at items "1" through "5" thereof, the taxpayer,

the Tax Law article and years in dispute, the taxpayer's identification number and the assessment identification number of the Notice of Deficiency issued against petitioner. This petition, filed in a timely manner, specifies that petitioner seeks a redetermination of a deficiency of personal income tax. It also specifies the amount of tax determined by the Division and contested by petitioner as \$44,127.27, the same amount as is reflected on the July 6, 2001 Conciliation Order.

B. In light of the foregoing, it cannot be said that the petition does not set forth a challenge to the Division's action, or that petitioner seeks relief which may not be provided by the Division of Tax Appeals. Simply put, the petition clearly indicates that the taxpayer disagrees with and challenges the Notice of Deficiency. The Division of Tax Appeals is the forum where a taxpayer would challenge a Notice of Deficiency, and there is no basis for concluding that the Division of Tax Appeals does not have subject matter jurisdiction over this case or does not have personal jurisdiction over this taxpayer.

C. The basis for the Division's motion appears to arise in response to Item "6" of the petition. As set forth in Item "6", petitioner's complaint or allegation of error is that the conciliation conferee did not hold proceedings in abeyance and, further, that any additional proceedings (in the Division of Tax Appeals) should be held in abeyance until such time as petitioner is released from prison and secures the return of his records. Clearly, the petition does not address the specific bases upon which petitioner is challenging the Notice, but rather only seeks to delay the same for an indefinite period.

D. As the findings of fact in this case reveal, petitioner has not listed any specific errors or alleged any specific facts with respect to his challenge to the Notice of Deficiency. While this may leave the Division at a loss to comprehend the particular bases for petitioner's challenge, it does not alter the fact that the petition challenges the Division's assertion of tax liability and

seeks a redetermination thereof. As noted earlier, this is not a case where the Division of Tax Appeals lacks subject matter or personal jurisdiction and thus could not provide relief, nor is it a case where statements in item “6” of the petition *negate* what would otherwise be a challenge to a notice by admitting to the correctness thereof. This is not a matter where the relief requested is not available or may not be granted as a matter of law (*see, Matter of Barr*, Tax Appeals Tribunal, February 15, 1996). In fact, the petition in this case in no way admits to the correctness of the Division’s Notice of Deficiency, or as a result negates petitioner’s challenge thereto, but rather seeks only to delay going forward with such challenge.

E. This matter is not, at present, scheduled for hearing, and thus to the extent that the petition requests an adjournment of proceedings *sine die*, it is denied as premature. Such being the case, the petition itself presents simply a timely challenge to the Notice, albeit one providing no detail as to the specific bases underlying such challenge.<sup>2</sup> The Tax Appeals Tribunal has stated, with respect to petitions, the following:

[t]he petition is intended to state the errors the Division has made and the facts which the petitioner intends to prove to establish these errors (20 NYCRR 3000.3[b][5]). The motion to dismiss the petition for failing to state a cause for relief is intended to eliminate the need for unnecessary hearings, by eliminating petitions that do not assert an error (*Matter of Waterset Enterprises, Inc.*, Tax Appeals Tribunal, January 16, 1992).

In light of the Tribunal’s statement, it is clearly incumbent upon petitioner to set forth, at least in summary fashion, the errors and facts petitioner intends to establish at a hearing. As submitted, the petition fails entirely to meet this requirement.

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<sup>2</sup> Under such circumstances, a Demand for a Bill of Particulars (20 NYCRR 3000.6[a]) or a Request for Admissions (20 NYCRR 3000.6[b]), as opposed to a motion to dismiss under 20 NYCRR 3000.9(a)(1)(vi), might have been undertaken by the Division in order to determine the bases, if any, for petitioner’s challenge.

F. The Division's motion is hereby granted and the petition is dismissed for failure to state a cause for relief. However, this Order shall not take effect and the petition shall not be dismissed for failure to state a cause for relief if, within 30 days of the date of this Order, petitioner submits an amended petition setting forth the errors allegedly made by the Division together with a statement of the facts upon which petitioner relies to establish such alleged errors.

DATED: Troy, New York  
April 25, 2002

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE